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ex rel. Bill Lockyer, Attorney General

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.*
BILL LOCKYER, ATTORNEY GENERAL,

Plaintiffs,

v.

MIRANT CORPORATION; MIRANT
CALIFORNIA, L.L.C.; MIRANT DELTA, L.L.C.;
MIRANT POTRERO, L.L.C.; MIRANT AMERICAS
ENERGY MARKETING, L.P.; MIRANT
CALIFORNIA INVESTMENTS, INC.; MIRANT
AMERICAS, INC.; SOUTHERN ENERGY
GOLDEN STATES HOLDINGS, INC., and DOES 1-
100,

Defendants.

Case No.: CGC-02-406461

**COMPLAINT FOR CIVIL
PENALTIES (BUSINESS AND
PROFESSIONS CODE § 17200)**

1 The People of the State of California, *ex rel.* Bill Lockyer, Attorney General, allege the
2 following on information and belief:

3 **I. INTRODUCTION**

4 1. In January, 2001, the Governor of the State of California declared a state of
5 emergency because of the energy crisis in the State. Skyrocketing electricity prices and supply
6 shortages resulted in widespread blackouts, utility bankruptcy, and massive economic upheaval.
7 Defendants Mirant Americas Energy Marketing LP, Mirant California, LLC, Mirant Delta LLC;
8 and Mirant Potrero, LLC, (“Mirant”), through unjust, unreasonable, and illegal overcharges and
9 price gouging received unprecedented profits at the expense of consumers, ratepayers, businesses,
10 and the State of California. Mirant’s profiteering and other unlawful and unfair business practices
11 resulted in hundreds of millions of dollars of overcharges and illegal profits.

12 2. This action, under section 17200 of the Business and Professions Code, based on
13 unlawful rates charged by Mirant, seeks to redress those wrongs. Each and every one of the
14 thousands of unjust and unreasonable rates charged by Mirant was an act of unfair competition,
15 subject to civil penalties. In addition, each of the tens of thousands of rates charged by Mirant,
16 but not filed with the Federal Energy Regulatory Commission (“FERC”), was an act of unfair
17 competition subject to civil penalties.

18 **II. PARTIES**

19 3. Plaintiffs are the People of the State of California, *ex rel.* Attorney General of
20 California, Bill Lockyer. Business and Professions Code section 17200 provides that actions to
21 prohibit unfair and unlawful business practices may be brought by the Attorney General in the
22 name of the People of the State of California.

23 4. Defendant Mirant Delta, L.L.C., formerly Southern Energy Delta, L.L.C., is a
24 limited liability company formed under the laws of the State of Delaware. On or about March
25 1999, Mirant Delta acquired from Pacific Gas & Electric Company two separate electricity
26 generation facilities located in Contra Costa County, California, the Pittsburg and Contra Costa
27 Power Plants. The two facilities consist of eleven separate generating units with a combined
28 capacity of approximately 2700 megawatts (“MW”). Mirant Delta is a wholly-owned subsidiary

1 of defendant Mirant California, L.L.C.

2 5. Defendant Mirant Potrero, L.L.C., formerly Southern Energy Potrero, L.L.C., is a
3 limited liability company formed under the laws of the State of Delaware. On or about March
4 1999, Mirant Potrero acquired from Pacific Gas & Electric Company the Potrero Power Plant, an
5 electricity generation facility located in San Francisco, California. The Potrero Power Plant
6 consists of four electricity generating units with a total capacity of approximately 400 MW.
7 Mirant Potrero is a wholly-owned subsidiary of defendant Mirant California, L.L.C.

8 6. Defendant Mirant Americas Energy Marketing, L.P., formerly Southern Company
9 Energy Marketing, L.P., is a limited partnership formed under the laws of the State of Delaware,
10 and a wholly-owned indirect subsidiary of defendant Mirant Corporation. Mirant Americas
11 Energy Marketing markets and distributes energy-related products in California. At all relevant
12 times alleged in this Complaint, Mirant Americas Energy Marketing acted in the capacity of ISO-
13 certified scheduling coordinator (“SC”) for itself and for defendants Mirant Delta and Mirant
14 Potrero.

15 7. Defendant Mirant California, L.L.C., formerly Southern Energy California, L.L.C.,
16 is a limited liability company formed under the laws of the State of Delaware that does business in
17 the State of California. Mirant California is engaged in the marketing and brokering of electric
18 energy and capacity, and is the parent company of Mirant Delta and Mirant Potrero. Mirant
19 California is fifty percent owned by each of defendants Mirant California Investments, Inc. and
20 Southern Energy Golden States Holdings, Inc.

21 8. Defendant Mirant California Investments, Inc., formerly Southern Energy
22 California, L.L.C., is a corporation formed under the laws of the State of Delaware that does
23 business in the State of California. Mirant California Investments is a subsidiary of defendant
24 Mirant Americas, Inc. and owns a fifty percent interest in Mirant California.

25 9. Defendant Southern Energy Golden States Holdings, Inc. is a corporation formed
26 under the laws of the State of Delaware that does business in the State of California. Southern
27 Energy Golden States Holdings is a subsidiary of defendant Mirant Americas, Inc. and owns a
28 fifty percent interest in Mirant California.

1 10. Defendant Mirant Americas, Inc., formerly Southern Energy North America, Inc.,
2 is a corporation formed under the laws of the State of Delaware which through its subsidiaries
3 does business in the State of California. Mirant Americas is a subsidiary of Mirant Corporation
4 and is the parent company of Mirant California Investments and Southern Energy Holdings.

5 11. Defendant Mirant Corporation, formerly Southern Energy, Inc., is a corporation
6 formed under the laws of the State of Delaware which, through its subsidiaries, does business in
7 the State of California. Mirant is a global energy company that develops, constructs, owns and
8 operates power plants, and sells wholesale electricity, gas, and other energy-related commodity
9 products.

10 12. The true names and capacities of defendants stated in this Complaint under the
11 fictitious names of Does 1 through 100, inclusive, are unknown to plaintiffs, who sue such
12 defendants by such fictitious names. Each of the fictitiously named defendants is responsible in
13 some manner for acts, occurrences, or omissions which caused the violations of law alleged
14 herein.

15 13. Unless otherwise alleged, whenever reference is made in this Complaint to any act
16 of the defendants, such allegation shall mean that each defendant acted individually and jointly
17 with the other defendants named in the Complaint.

18 14. Unless otherwise alleged, whenever reference is made in this Complaint to any act
19 of any corporate or other business defendant, such allegation shall mean that such corporation or
20 other business defendant did the acts alleged in this Complaint through its officers, directors,
21 employees, agents, and/or representatives while they were acting within the actual or ostensible
22 scope of their authority.

23 15. At all relevant times alleged in this Complaint, each of the defendants has acted as
24 an agent, representative, or employee of each of the other defendants and has acted within the
25 course and scope of said agency or representation.

26 **III. JURISDICTION AND VENUE**

27 16. This Court has jurisdiction pursuant to California Constitution Article VI, section
28 10, because this case is a cause not given by statute to other trial courts.

1 17. This Court has jurisdiction over the defendants named above because they do
2 sufficient business in California, or otherwise have sufficient minimum contacts in California to
3 render the exercise of jurisdiction over them by the California courts consistent with traditional
4 notions of fair play and substantial justice.

5 18. Venue is proper in this Court because the cause arises in the City and County of
6 San Francisco where some of the violations of law have occurred.

7 **IV. STATUTORY BACKGROUND**

8 **A. The Unfair Competition Act**

9 19. California Business and Professions Code section 17200 provides that "unfair
10 competition shall mean and include unlawful, unfair or fraudulent business practice." Section
11 17203 of the Business and Professions Code provides that "(a)ny person performing or proposing
12 to perform an act of unfair competition within this state may be enjoined in any court of competent
13 jurisdiction."

14 20. Section 17206(a) provides that any person violating Section 17200 "shall be liable
15 for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation,
16 which shall be assessed and recovered in a civil action brought in the name of the people of the
17 State of California by the Attorney General or by any district attorney." Under section 17205,
18 these penalties are "cumulative to each other and to the remedies or penalties available under all
19 other laws of this state."

20 **B. The Federal Power Act**

21 21. The Federal Power Act ("FPA"), 16 U.S.C. §§ 824 et seq., governs sales of
22 wholesale electricity. Under the FPA, all rates and charges, changes to rates, and all contracts
23 must be filed with FERC. 16 U.S.C. § 824d. In addition, all rates and charges made, demanded,
24 or received for wholesale electricity must be just and reasonable, and any rate or charge that is not
25 just and reasonable is unlawful. 16 U.S.C. § 824d(a).

26 **V. FACTS**

27 **A. Deregulation of the California Electricity Market**

28 22. In 1996, the State of California enacted AB 1890, codified in the Public Utilities

1 Code, to restructure the California electricity market. AB 1890, inter alia, required California's
2 investor owned utilities, Pacific Gas & Electric Co. ("PG&E"), Southern California Edison Co.
3 ("SCE"), and San Diego Gas & Electric Co. ("SDG&E"), to sell much of its electric generation
4 capacity in order to create competition in the generation and sale of wholesale electricity in
5 California.

6 23. AB 1890 also established two new institutions: the California Power Exchange
7 ("PX") and the California Independent Systems Operator ("ISO"). The PX was established under
8 state law to operate a market for the purchase and sale of electricity for delivery during the same
9 or next day. The ISO was established under state law to manage the transmission network,
10 procure electricity during actual operation ("real-time") in order to manage imbalances between
11 demand and supply as they occur, and to maintain the reliability of the transmission grid. The
12 purchases and sales of electricity in the markets administered by the PX and ISO are for
13 subsequent retail resale (to customers of the investor owned utilities, primarily). Sales of
14 wholesale electricity also occur outside of the PX and ISO markets.

15 24. The Federal Power Act grants FERC exclusive jurisdiction over wholesale sales of
16 electricity. 16 U.S.C. § 824. The creation and operation of the PX and ISO were approved by
17 FERC because of the role of the PX and ISO in wholesale electricity sales. Thus, the PX and ISO
18 are governed in part by tariffs filed with FERC and in part by state law. Bilateral out of market
19 sales of wholesale electricity are also regulated, in theory, by FERC and the FPA.

20 **B. Operation of the California Electricity Markets**

21 25. The investor owned utilities are responsible for providing electricity to retail
22 customers (homes, businesses, industry). Before California began purchasing wholesale electricity,
23 the investor owned utilities, to the extent their own generation was insufficient to supply all of the
24 needs of their retail customers, purchased wholesale energy from generators such as Mirant for
25 resale, and made those purchases through both the PX and ISO markets. Both the utilities and the
26 generators are connected to the State's electricity grid, which is managed by the ISO. Because of
27 the nature of electricity (and the fact that it cannot be stored once generated), the operation of the
28 grid and balancing of supply and demand is a highly complex operation. As a result, operation of

1 the grid requires, inter alia, both electricity and ancillary services.

2 26. Substantial portions of the electricity requirements for any given day were
3 scheduled through the PX in conjunction with the ISO. The ISO was also able to procure real-
4 time energy as needed. These markets operate in one-hour increments (and even in ten-minute
5 increments), requiring bidding, sales, and purchases for each hour or ten-minute increment.
6 Ancillary services are separate markets operated by the ISO for the delivery of electricity on
7 demand. Generators bid into ancillary services markets and, when their bids are accepted, agree to
8 provide electricity if the ISO determines, through the operation of the grid, that the electricity is
9 needed. There are a series of different ancillary services markets that are used by the ISO to
10 provide slightly different services.

11 27. Before declaring bankruptcy and ceasing operations as a result of the energy crisis,
12 the PX operated two electricity markets: the day-ahead market for delivery the next day, and the
13 day-of market for delivery the same day. While it was operating, the PX scheduled the majority of
14 electricity in the State (through the ISO as the operator of the grid).

15 28. While demand for electricity may be reasonably forecast for any given day, the
16 forecast is never exact. As a result, every day, the ISO must supplement the day-ahead and day-of
17 electricity with real time and ancillary services electricity.

18 29. The ISO does not buy and sell electricity for its own account. As part of its market
19 functions, it assigns costs and payments to market participants based on sales and purchases in the
20 various real time and ancillary services markets that the ISO administers.

21 30. Entities also buy and sell wholesale electricity in bilateral out of market deals.
22 These deals can and do impact market prices and supplies.

23 31. In theory, through the interaction of these various markets and out of market sales,
24 electricity supply and demand remain in check, and the ISO can operate the grid with reliability.
25 The theory did not come to fruition in California.

26 **C. Breakdown of Market and Skyrocketing Prices**

27 32. For a number of reasons, including limited supply of natural gas and possible
28 manipulation of supply by generators of electricity, the wholesale price of electricity increased

1 dramatically in California in the summer of 2000. The massive price increases and the drop in
2 supply resulted in blackouts and massive economic upheaval in the state.

3 33. On January 17, 2001, Governor Davis declared a state of emergency because of
4 the energy crisis. The State suffered repeated rolling blackouts, was subject to two months of
5 stage 3 electricity emergencies requiring reduced usage, and ratepayers were hit with massive
6 increases in retail electricity charges.

7 34. The two primary investor owned utilities, which each had upstreamed billions of
8 dollars to their parent companies, were subject to retail price caps and were limited in the amount
9 of revenues they could raise from ratepayers. As a result, both SCE and PG&E incurred
10 enormous debt and defaulted on payments to both the PX and the ISO. PG&E declared
11 bankruptcy. The State, as the only available creditworthy buyer, spent billions of dollars
12 purchasing electricity to keep the lights on in California.

13 35. On December 14, 2000, the Department of Energy ordered out-of-state suppliers to
14 deliver power to California. FERC also ordered both soft and hard price caps in an attempt to
15 control prices charged by generators for electricity in the State.

16 36. Prices for wholesale electricity soared. In 1999, California paid approximately \$7
17 billion for electricity. In 2000 and 2001, Californians paid approximately \$27 billion for
18 approximately the same quantity of electricity.

19 37. Meanwhile, generators of electricity, including Mirant, enjoyed massive, historic
20 profits.

21 **D. FERC's Determination of Unjust, Unreasonable, Unlawful Prices**

22 38. In a November 1, 2000 order (and repeated and reaffirmed in orders dated April
23 19, 2001, July 25, 2001, and December 19, 2001), FERC found that the "electric market structure
24 and market rules for wholesale sales of electric energy in California were seriously flawed and that
25 these structures and rules, in conjunction with an imbalance of supply and demand in California,
26 have caused, and continue to have the potential to cause, unjust and unreasonable rates for short-
27 term energy. . . ." *San Diego Gas & Electric Co., et al.*, 93 FERC ¶ 61,294 (2000).

28 39. The FPA, at 16 U.S.C. § 824d(a), declares unlawful any unjust and unreasonable

1 rate or charge for wholesale electricity.

2 40. In its July 25, 2001 and December 19, 2001 Orders (and in a refund proceeding
3 currently before FERC), FERC determined a formula for the maximum just and reasonable price,
4 based on the heat rate of any particular generating unit times the gas price plus six dollars times
5 1.1. All charges above the formula rate are unjust and unreasonable.

6 41. Based on the FERC formula and the calculation done by the ISO, Mirant has
7 exceeded the just and reasonable price on tens of thousands of separate occasions, in violation of
8 16 U.S.C. § 824d(a).

9 **E. Mirant's Actions and Profits**

10 42. Through its scheduling coordinators, Mirant sold electricity into the California
11 markets. It operated in all of the markets, including day-ahead, hour-ahead, real-time, and
12 ancillary services. It made tens of thousands of electricity transactions in those markets starting in
13 before 1998 and continuing through 2002.

14 43. Under the FPA, all rates and charges, all changes to rates and charges, and all
15 contracts must be filed with FERC. 16 U.S.C. § 824d; 18 C.F.R. § 35.1.

16 44. Since 1998, Mirant has entered into hundreds of thousands of separate transactions
17 for the sale of wholesale electricity.

18 45. Mirant has never filed its rates, charges, changes to rates and charges, or its
19 contracts with FERC. Instead, it filed a statement with FERC that it will charge rates as agreed
20 upon by Mirant and the purchaser. In addition, Mirant files quarterly summaries of sales (with
21 limited information) after the fact. Mirant's failure to file rates as required by the FPA deprived
22 the public, power purchases, ratepayers, and FERC of notice and information necessary to make
23 informed decisions about rates.

24 46. Regardless of whether Mirant withheld supply of electricity, exercised market
25 power, or manipulated the price of electricity or the electricity markets in any other way, Mirant
26 charged rates in the California electricity markets that were unjust, unreasonable, and therefore
27 illegal, and did so on tens of thousands of occasions starting in early 2000 and continuing through
28 2001. And on tens of thousands of occasions, it failed to file the rates it charged, in violation of 16

1 U.S.C. § 824d(a) and 18 C.F.R. § 35.1.

2 **FIRST CAUSE OF ACTION**

3 **UNFAIR BUSINESS COMPETITION**

4 **(Business and Professions Code § 17200 et seq.)**

5 47. Paragraphs 1 through 46 are realleged and incorporated as if fully set forth herein.

6 48. Beginning on an exact date unknown to plaintiff, but within four years preceding
7 the filing of this complaint, defendants have engaged in acts of unfair competition as defined in
8 Business and Professions Code section 17200, as follows: Each and every sale or purchase of
9 wholesale electricity by defendants for which defendants failed to file the charge, rate, price or
10 contract reflecting the terms of the sale or purchase, as required by the Federal Power Act, FPA
11 regulations, and FERC orders setting forth filing requirements. The number of such sales or
12 purchases is in the hundreds of thousands;

13 49. Said violations render defendant liable to plaintiff for civil penalties of up to
14 \$2,500 per day for each violation, and other equitable relief as appropriate.

15 **SECOND CAUSE OF ACTION**

16 **UNFAIR BUSINESS COMPETITION**

17 **(Business and Professions Code § 17200 et seq.)**

18 50. Paragraphs 1 through 49 are realleged and incorporated as if fully set forth herein.

19 51. Beginning on an exact date unknown to plaintiff, but within four years preceding
20 the filing of this complaint, defendants have engaged in acts of unfair competition as defined in
21 Business and Professions Code section 17200, as follows: Each and every rate, charge, or price
22 charged by defendants in violation of the Federal Power Act, 16 U.S.C § 824d(a), as unfair,
23 unreasonable, and therefore unlawful;

24 52. Said violations render defendant liable to plaintiff for civil penalties of up to \$2,500
25 per day for each violation, and other equitable relief as appropriate.

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PRAYER FOR RELIEF

- WHEREFORE, plaintiffs pray that the Court:
- 1. Award civil penalties according to proof;
 - 2. Award plaintiffs their costs of suit;
 - 3. Award plaintiffs their attorneys fees;
 - 4. Grant such other and further relief as the court deems just and proper.

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| Dated: April 9, 2002 | Respectfully submitted, |
| | BILL LOCKYER, Attorney General of the State of California |
| | RICHARD M. FRANK Chief Assistant Attorney General |
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